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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CLAYTON EDWARD SMITH et al., Plaintiffs and Appellants, v. FRANK C. ALEGRE TRUCKING et al., Defendants and Respondents.	A154255 (Alameda County Super. Ct. No. RG15795108)

In December 2013, Susan Watson was struck and killed by a truck owned by defendant Frank C. Alegre Trucking and driven by one of its employees, defendant Stan Cohran. Plaintiff Clayton Smith, who had a 27-year relationship with Watson, brought suit for wrongful death, alleging that he was Watson's spouse or putative spouse on three separate and independent bases, including that he and Watson had a common law marriage under Colorado law. The trial court granted summary judgment for defendants, concluding that Smith had failed to demonstrate any of his three bases. We conclude that Smith has shown a triable issue of material fact as to whether he and Watson entered into a Colorado common law marriage, and reverse on that ground, without reaching his other theories.

FACTUAL AND PROCEDURAL BACKGROUND

The General Setting

Plaintiff Clayton Smith and Susan Watson met in Berkeley in 1986 and began a romantic relationship. At that time, Smith was still married to Sherry Tomlinson, from whom he separated in 1988. Smith moved in to Watson's house in Berkeley, and over

the years the couple purchased additional properties together in both California and Colorado.

On December 17, 2013, Watson was riding her bicycle in Oakland when she was struck and killed by a truck owned by defendant Frank C. Alegre Trucking and driven by its employee, defendant Stan Cohran (collectively defendants).

The Proceedings Below

On December 1, 2015, Smith and the "Estate of Susan Rose Watson" (estate) filed a complaint against defendants in Alameda County Superior Court, alleging five causes of action: (1) survivor liability (Cal. Code Civ. Proc. § 377.30); (2) negligence; (3) negligent infliction of emotional distress; (4) loss of consortium; and (5) wrongful death (Cal. Code Civ. Proc. § 377.60, subd. (a)).

Defendants filed a demurrer, and after a hearing on August 10, 2016, the trial court filed an order that: overruled the demurrer as to the wrongful death cause of action, sustained the demurrer with leave to amend as to the survivor liability cause of action, and sustained the demurrer without leave to amend as to the remaining three causes of action.

On September 7, plaintiffs filed a First Amended Complaint, asserting two causes of action, for survivor liability and wrongful death.

On November 22, the parties filed a stipulation and order that: dismissed the estate as a party without prejudice, dismissed the survivor liability claim without prejudice, and agreed to toll the statute of limitations as to "the dismissed party and cause of action."

Defendants then moved for summary judgment on the only remaining cause of action, wrongful death, set for a hearing on January 4, 2018. Defendants argued that Smith did not have standing to assert a wrongful death claim because he was neither Watson's "spouse" nor her "putative spouse" within the meaning of Code of Civil

Procedure, section 377.60, subdivisions (a) and (b).[1] Smith filed opposition, arguing in part that he had standing under three theories: (1) that the couple had a common law marriage under Colorado law; (2) that the couple had married on a cruise ship in Tahiti in 1999; and (3) that Smith was Watson's "putative spouse" because he held a genuine and honest belief in the validity of their marriage. Defendants filed a reply.

The Tentative Ruling, Supplemental Briefing, and Proposed Supplemental Complaint

In a January 4 tentative ruling, the trial court set forth what it perceived to be the evidence and then its conclusion, as follows:

"It appears that Plaintiff and Ms. Watson met while working together in California in 1986 [citation], and they lived and worked together here from roughly 1986 to some point in the late 1990s, when Ms. Watson got a job in Boulder, Colorado. [Citation.] She began living in Coloroado [*sic*] full time, first in a long-term-residence hotel and then in a house that she bought in Boulder, for which Plaintiff is unable to recall or produce any evidence that he helped pay or was on the title. [Citation.] Plaintiff continued to reside and work in Berkeley for four days a week, and resided with Ms. Watson in the Boulder house for three days a week. [Citation.] Plaintiff never filed taxes, had a bank account, or obtained a driver's license or identification card in Colorado [citation], although he believed that Ms. Watson did the first two things while living there. [Citation.] Then Ms. Watson ceased working at the Colorado job after somewhat less than three years [citation]—the record is surprisingly unclear as to precisely when her Colorado job and residence began and ended—whereupon she moved back to the Bay Area. [Citation.] She and Plaintiff then lived together in some combination of the Berkeley and El Cerrito properties from 1999 until the fatal accident in December 2013. [Citation.] Meanwhile, in 1990 in a way seemingly separate from the late 1990s Boulder job, Plaintiff and Ms.

[1] Which provides: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: (a) The decedent's surviving spouse . . . . (b) Whether or not qualified under subdivision (a), if they were dependent on decedent, the putative spouse . . . ."

Watson purchased as joint tenants a house in Salida, Colorado, as a vacation home and intended retirement home. [Citation.]

"On this motion, the parties dispute at length whether Plaintiff has identified in his deposition testimony, produced documents that show, and/or identified evidence in his opposition raising a triable factual dispute as to whether his and Ms. Watson's three-day-per-week co-residence in Colorado for somewhat less than three years would constitute a common law marriage as that institution is recognized and defined by Colorado law. (See generally *People v. Lucero* (Colo. 1987) 747 P.2d 660, 663–665.) The parties do not dispute that, if Plaintiff and Ms. Watson's joint conduct in Colorado amounted to a common law marriage under Colorado law, then a California court would recognize that marriage as legally sufficient to give Plaintiff standing to pursue a wrongful death action in California as decedent's spouse. The parties also do not dispute that, as Defendants exhaustively demonstrate, (1) California abolished common law marriage over a century ago; (2) standing to assert a wrongful-death action in California is entirely statutory; and (3) California precedent firmly establishes that, unlike 'spouses' or 'putative spouses,' unmarried cohabitants do not have standing to assert a wrongful-death cause of action, no matter how long or how emotionally and practically significant was their relationship with a decedent.

"In the original briefing on this motion, Defendants did not question the proposition that a California court would nonetheless hold that a Colorado common law marriage made Plaintiff the 'spouse' of Ms. Watson for purposes of Code of Civil Procedure Section 377.60(a), presumably because this court had stated in its demurrer order, as quoted above, that Plaintiff had 'cite[d] authority establishing that, "although common law marriage has been abolished in California ([Citation]), California recognizes the validity of a common law marriage contracted in another state which would be valid under the laws of that state." ' [Citations.] But in considering the initial briefing on this motion, this court concluded that it is highly debatable, as a matter of law and policy, whether a California court should conclude that Plaintiff and Ms. Watson's part-time co-residence in Colorado amounted to 'contracting' a common law marriage in

that state, which could be subject to legal recognition in California for purposes of wrongful-death standing, even if the court assumes for argument's sake Plaintiff's version of the historical facts, and draws all reasonable inferences in his favor.

"The statute on which Knight [*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 19] and Badgett [*People v. Badgett* (1995) 10 Cal.4th 330, 363] rely is Family Code section 308, which says that '[a] marriage contracted outside this state that would be valid by laws of the jurisdiction in which the marriage was contracted is valid in California.' The problem here is that, to the extent Plaintiff believed that his relationship with Ms. Watson constituted a common law marriage, they 'contracted' that marriage here in California in the mid-1980s (where it is not legally recognized). Then, in the late 1990s, Ms. Watson moved to Colorado. She lived there full time, and Plaintiff lived there with her part time, for somewhat under three years. Nothing in the record suggests that their relationship substantively differed from what it had been in California . . . . And she and Plaintiff resumed living together in the same relationship they had begun here in 1986. In sum, Plaintiff and Defendant spent roughly the middle 10% of a 27-year relationship, which began and ended in California, living together for 3 days a week, allegedly as husband and wife, in Colorado."

In light of the law of summary judgment discussed below, we digress briefly to note that the trial court's skeptical view of the evidence is hardly appropriate, including, for example, its aside noting that plaintiff was not on the title for the Boulder property, its characterization of the purchase of the Salida property as "seemingly separate" from the Boulder job, and its observation that the period during which Watson lived in Colorado was "10% of a 27-year relationship." Such an approach is not consistent with the court's obligation to "view the evidence in the light most favorable to plaintiff" (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 254), and to "accept all reasonable inferences which could be drawn by a trier of fact in favor of plaintiff." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 854.)

The trial court continued the hearing and requested supplemental briefing, including on the issue of "whether Plaintiff and Ms. Watson's period of co-residence in

Colorado can, as a matter of law and policy, amount to '[a] marriage contracted outside this state' for purposes of Family Code Section 308, assuming Plaintiff's version of the facts, and assuming that a Colorado court would *find* that the parties' joint conduct and general repute in Colorado was sufficient to constitute a common law marriage under Colorado law." (Italics added.)

The parties filed the requested supplemental briefing, following which a hearing was held on March 8 at which the trial court evidently indicated it would grant defendants' motion, although there is no transcript in the record.

On March 23, plaintiff moved for leave to file a supplemental complaint, asserting that "[c]laims which were dismissed by stipulation and a tolling agreement need to proceed now that the defense motion for summary judgment has been granted as to the formal complaint." The proposed "supplemental" complaint again named the "Estate of Susan Rose Watson", this time "by and through its Administrator Malcom B. Feied," as a plaintiff, and asserted claims for survivor liability, negligence and gross negligence, negligent infliction of emotional distress, and loss of consortium. Defendants opposed the motion.

The March 28 Order

On March 28 the trial court issued a written order granting defendants' motion. Doing so, the court had this to say with respect to the Colorado common law marriage theory:

"As to this theory, Plaintiff's supplemental brief misses the point of this court's order continuing the hearing, as it merely emphasizes the same points and arguments Plaintiff already made, e.g., that cohabitation is one fact from which Colorado courts can infer a common law marriage, and that Plaintiff has assertedly shown a 'mutual consent' by Plaintiff and Decedent to be married based on 'the evidence already before the Court'. . . . [This] in no way addresses the fact that Plaintiff and Decedent's relationship was in no way 'contracted' in Colorado while Decedent lived there (and Plaintiff lived there part time). Plaintiff has not demonstrated that he can submit any evidence raising a triable dispute about whether he and Decedent agreed to enter a common law

marriage—as opposed to simply continuing the relationship they had formed in California—while they lived in Colorado. Plaintiff identifies no cogent reason to treat their sojourn in Colorado as transforming their California-based relationship from one of cohabitation (which could not, as a matter of California law, be a marriage) into a Colorado common law marriage."

The trial court summarized its holding: "Accordingly, despite having been given an opportunity, Plaintiff has not cited any relevant authority or made any cogent argument as to why a Colorado court would hold that a couple with an existing, long-term relationship formed in California had contracted a common law marriage in Colorado simply because (1) one member of the couple became a Colorado resident for several years, (2) the other member of the couple lived with her part-time in Colorado while remaining a California domiciliary, and (3) the two continued their relationship essentially unchanged, without forming any new agreement while in Colorado to become common law spouses. And Plaintiff still has not identified the law governing his purported shipboard marriage to Decedent in Tahiti. He thus cannot identify facts or evidence suggesting that he can raise a triable factual dispute as to whether that alleged marriage satisfies those still-unidentified legal requirements.

"In sum, Plaintiff has not refuted Defendants' showing that he is unable to submit admissible evidence raising a triable factual dispute as to whether he was Decedent's spouse, in a way cognizable under California law, based on either the Colorado common law marriage or the Tahiti shipboard marriage. Defendants are thus entitled to summary judgment because Plaintiff cannot establish that he has standing to assert a cause of action for wrongful death."

On April 26, the trial court denied the motion for leave to file a supplemental complaint. Judgment was thereafter entered for defendants, from which Smith appealed.

DISCUSSION

The Applicable Law of Summary Judgment

"Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) As applicable here, moving defendants can meet their burden by demonstrating that 'a cause of action has no merit,' which they can do by showing that '[o]ne or more elements of the cause of action cannot be separately established . . . .' (§ 437c, subd. (*o*)(1); see also *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 486–487.) Once defendants meet this burden, the burden shifts to plaintiff to show the existence of a triable issue of material fact. (§ 437c, subd. (p)(2).)

"On appeal '[w]e review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]' (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) Put another way, we exercise our independent judgment, and decide whether undisputed facts have been established that negate plaintiff's claims. (*Romano v. Rockwell Internat., Inc.*, *supra*, 14 Cal.4th at p. 487.) As we put it in *Fisherman's Wharf Bay Cruise Corp. v. Superior Court* (2003) 114 Cal.App.4th 309, 320: '[W]e exercise an independent review to determine if the defendant moving for summary judgment met its burden of establishing a complete defense or of negating each of the plaintiff's theories and establishing that the action was without merit.' (Accord, *Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972.)

"But other principles guide us as well, including that '[w]e accept as true the facts . . . in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them.' (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67.) And we must ' " 'view the evidence in the light most favorable to plaintiff[] as the losing part[y]" ' and ' "liberally construe plaintiff['s] evidentiary submissions and strictly scrutinize defendant['s] own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor.' " ' (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96–97.)" (*Nazir v. United Airlines, Inc.*, *supra*, 178 Cal.App.4th at pp. 253–254; accord, *Binder v. Aetna*

Life Ins. Co., supra, 75 Cal.App.4th at p. 854 ["We must . . . accept all reasonable inferences which could be drawn by a trier of fact in favor of plaintiff"].)

Summary Judgment Was Improperly Granted: There is a Triable Issue of Material Fact on the Colorado Common law Marriage Theory

Smith argues that the trial court erred in granting summary judgment to the defendants because there were triable issues of fact as to whether he had a Colorado common law marriage to Watson, whether he was married to Watson on a cruise ship in Tahiti in 1999, and whether he was Watson's "putative spouse" within the meaning of Code of Civil Procedure, section 377.60, subdivision (b). He also argues that he should have been granted leave to amend his complaint to assert a survivor liability cause of action. We conclude the trial court erred in granting summary judgment to defendants, as there was a triable issue of fact with respect to Smith's Colorado common law marriage theory of standing.

As noted, Code of Civil Procedure, section 377.60, subdivision (a), provides: "A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf: (a) The decedent's surviving spouse . . . ." And Family Code section 308 provides: "A marriage contracted outside this state that would be valid by laws of the jurisdiction in which the marriage was contracted is valid in California."

In its January 4 tentative ruling, the trial court appeared to assume that Smith could establish a Colorado common law marriage, directing the parties in their supplemental briefing to "assum[e] that a Colorado court would find that the parties' joint conduct and general repute in Colorado was sufficient to constitute a common law marriage under Colorado law," and then to brief whether such a marriage would be valid in California under Family Code section 308. But in its order after the supplemental briefing, the trial court appeared to conclude that a Colorado common law marriage had not been established, finding, apparently as a matter of law, that "Plaintiff identifies no cogent reason to treat their sojourn in Colorado as transforming their California-based

relationship from one of cohabitation (which could not, as a matter of California law, be a marriage) into a Colorado common law marriage." This was error.

A Colorado common law marriage is established by (1) the parties' mutual consent or agreement to be husband and wife, followed by (2) their mutual and open assumption of a marital relationship. (*People v. Lucero* (Colo. 1987) 747 P.2d 660, 663 (*Lucero*).) "The very nature of a common law marital relationship makes it likely that in many cases express agreements will not exist." (*Id*. at p. 664.) "The two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife. Specific behavior that may be considered includes maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the parties; and the filing of joint tax returns. [Citation.] However, there is no single form that any such evidence must take. Rather, any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife will provide the requisite proof from which the existence of their mutual understanding can be inferred." (*Id*. at p. 665; see *In re Estate of Little* (Colo.Ct.App. 2018) 433 P.3d 172, 176–177.) And as particularly apt here, on summary judgment, *Lucero* held that "[a] determination of whether a common law marriage exists turns on issues of fact and credibility." (*Lucero, supra*, 747 P.2d at p. 665.)

As to the first element, the trial court erred in imposing a requirement, above and beyond a common law marriage valid under Colorado law, that that marriage be "contracted" in Colorado under Family Code section 308. As the trial court in its tentative ruling noted—and as the parties do not appear to dispute on appeal—"if Plaintiff and Ms. Watson's joint conduct in Colorado amounted to a common law marriage under Colorado law, then a California court would recognize that marriage as legally sufficient to give Plaintiff standing to pursue a wrongful death action in California as decedent's spouse." Indeed, California courts have analyzed whether a common law marriage exists under the law of other jurisdictions for purposes of Family Code section

308 (or its predecessor, former Civil Code section 4104) without any separate requirement that the marriage be "contracted" in those alternate jurisdictions. (See, e.g., *Etienne v. DKM Enterprises, Inc.* (1982) 136 Cal.App.3d 487, 491; *Rosales v. Battle* (2003) 113 Cal.App.4th 1178, 1183; *People v. Badgett, supra*, 10 Cal.4th at pp. 363–366; see also *Elden v. Sheldon* (1988) 46 Cal.3d 267, 275 fn. 5 [citing *Etienne* with approval].)

The only authority cited by defendants before the trial court for the proposition that a Colorado common law marriage must be "contracted" anew in Colorado to be recognized in California is *Tatum v. Tatum* (9th Cir. 1957) 241 F.2d 401 (*Tatum*). There, the decedent, Erwin Tatum, was married in Texas to a Mattie Tatum, from whom he separated in 1935. (*Id*. at p. 404.) Erwin and plaintiff, Bertha Tatum, were married in Arizona in 1943, and thereafter lived in California as husband and wife. (*Ibid*.) In 1948, Erwin made a trip to Texas, met Mattie, and returned with her to California, where they resumed marital relations until September 1948, at which point he returned to Bertha. (*Ibid*.) Mattie sought a divorce and a final judgment of divorce was entered in 1949. Meanwhile, Erwin lived with Bertha until his death in 1954, during which time he and Bertha made several "combined business and vacation trips" to Texas, trips of "short duration." (*Ibid*.) After Erwin's death, Bertha sought the proceeds of a life insurance policy under the provisions of the Federal Employees Group Life Insurance Act, arguing in relevant part that she and Erwin had a common law marriage under Texas law. (*Id*. at pp. 403–405.)

After a bench trial, the court found that the couple's trips to Texas had not created a common law marriage under Texas law because there was no mutual consent or agreement to be husband and wife. (*Id*. at p. 407.) The appellate court affirmed, concluding this finding was not clearly erroneous. The court also rejected plaintiff's argument that a common law marriage was created as a matter of law upon the 1949 divorce, because under Texas law "in cases involving out-of-state residents, particularly where the relationship is meretricious, it is essential to prove a new agreement." (*Id*. at p. 409.) *Tatum* is of no relevance here, for several reasons: it concerns a requirement of

Texas law; it does not discuss, or even mention, Family Code section 308; and it involved factual findings made after trial.

On appeal, defendants do not dispute that Smith could establish standing under the wrongful death statute by "factually establishing his 'common law marriage' " in Colorado. Instead, in a section of their brief all of one and a half pages long, defendants argue that Smith could not establish a Colorado common law marriage as a matter of law because (1) he remained married to Ms. Tomlinson through the period of cohabitation in Colorado; and (2) he and Watson "did not file joint federal or state tax returns, list each other as 'spouses' on insurance forms or retirement plans (no such facts/documents were identified for the relevant time period), there was no ceremony, and there is no evidence they held themselves out to be husband and wife to anyone."

Defendants' first argument simply mischaracterizes the record. Smith and Tomlinson's divorce judgment, of which the trial court took judicial notice, was entered on September 22, 1999, effective nunc pro tunc to December 9, 1988. Indeed, defendants' own statement of undisputed material facts indicates that Watson moved to Boulder, Colorado "[i]n approximately 1998" and "lived there for approximately three years." In short, the undisputed facts do not establish that Smith remained married to Tomlinson throughout the period that Watson lived in Colorado.

The trial court did not consider defendants' second argument. Our de novo review leads us to the conclusion that defendants have not carried their burden to show that undisputed facts negate Smith's theory that he and Watson had a Colorado common law marriage, that is, show that such a marriage cannot be established as a matter of law.

While defendants' statement of undisputed material facts claimed that Smith and Watson never filed joint or married tax returns, that Smith never had a job, bank account, or identification card in Colorado, and that Smith did not file Colorado taxes, or consider Colorado his "primary residence," these facts are not dispositive. The requirements are mutual agreement to be husband and wife, and the open assumption of a martial

relationship.[2] And there is "no single form" that the evidence must take. (*Lucero*, *supra*, 747 P.2d at p. 665.)

Smith testified at deposition that he lived together with Watson beginning in 1986 for some 27 years, and that while she lived and worked in Colorado, he spent "[a]lmost every weekend" there, working "four-day weeks [in California]" and "going out there [to Colorado] almost half-time." He and Watson owned five properties together, including one purchased in 1990 in Salida, Colorado, which they owned as joint tenants. Smith also testified that he and Watson "pooled our resources and took care of each other," and that he thought of himself as married to her. They had at least one joint bank account during the period in which Watson lived in Colorado, although that account was in California. This testimony, we conclude, demonstrates a triable issue of fact precluding summary judgment on Smith's theory that he and Watson had a Colorado common law marriage.[3] (See *Lucero*, *supra*, 747 P.2d at p. 665 ["A determination of whether a common law marriage exists turns on issues of fact and credibility"].)

Denial of the Motion for Leave to Amend

As noted, Smith sought to amend or supplement the complaint after the trial court's summary judgment ruling, and the trial court relied on its summary judgment ruling in denying that motion. And denial of a motion for leave to amend is not generally an appealable order, especially where, as is the case here, given our reversal of the judgment, it is not in effect a final determination of the plaintiff's rights. (See Code Civ. Proc. § 904.1; *Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 241.)

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[2] Defendants' statement of undisputed material facts attached excerpts of Smith's deposition testimony. Smith's opposition attached a declaration and several documents, but they are not part of the record on appeal.

[3] Given this conclusion, we need not reach the additional arguments regarding Smith's other theories of standing. (See *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 717 ["As the party moving for summary judgment, [defendant] had the burden to show that it was entitled to judgment with respect to all theories of liability asserted by [plaintiff]"].)

Accordingly, we will not reach the parties' arguments regarding the trial court's denial of the motion.

DISPOSITION

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion. Plaintiffs shall recover their costs on appeal.

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Richman, J.

We concur:

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Kline, P. J.

_____
Stewart, J.

Smith et al. V. Frank C. Alegre Trucking et al. (A154255)